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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 9,2002

VIA ECFS

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW - A325
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("TCPA")
CG Docket No. 02-278

Dear Ms. Dortch:

MBNA America Bank, N.A. ("MBNA; "the Company") appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NPR) issued by the Federal Communications Commission ("FCC"; "Commission") regarding rules and regulations implementing the Telephone Consumer Protection Act ("TCPA; " TCPA Rules").

MBNA and Telemarketing.

MBNA is a national banking association chartered and supervised by the Office of the Comptroller of the Currency.

MBNA, the world's largest independent issuer of MasterCard and Visa credit cards, specializes in the marketing of affinity credit cards. Through agreements with more than 5,000 organizations, MBNA issues credit cards endorsed by colleges and universities, professional sports teams, cause-related organizations, professional trade associations and similar organizations. The marketing and use of affinity cards provide substantial financial benefits to the colleges, universities and other entities that endorse the cards.

One of the primary marketing channels utilized by MBNA is telephonic communications with existing and prospective customers. These telemarketing activities are conducted out of locations in 11 states (California, Delaware, Florida, Georgia, Maine, Maryland, New Hampshire, New Jersey, Ohio, Pennsylvania, and Texas).

Telemarketing offers earning opportunities to retirees seeking supplemental income; working students; single parents; and other individuals, many of them economically disadvantaged, who can work only part-time and need flexible work schedules.

The Company conducts its telemarketing activities in accordance with the highest ethical standards, adheres to the Codes of Conduct of both the Direct Marketing Association ("DMA) and the American Teleservices Association ("ATA"), and complies with all applicable state and federal laws and regulations.

In addition to monitoring and insuring compliance with a broad range of telemarketing-related laws and regulations, MBNA maintains Do Not Call ("DNC) lists that comply with the TCPA and all applicable state DNC laws. In addition, MBNA participates in the Telephone Preference Service maintained by the DMA.

Overview of **MBNA Comments**

MBNA's comments on the Commission's NPR address primarily the following points:

1. Any new or revised TCPA Rules issued by the Commission must balance the rights of consumers with the rights of legitimate telemarketers.
2. The company-specific DNC approach chosen by the Commission in 1992 remains valid. Any issues related to this approach can and should be resolved through clarifying regulations.
3. The "established business relationship exemption should be retained in its current form.
4. The use of predictive dialers and answering machine detection should not be restricted unreasonably.
5. A uniform national framework for the regulation of telemarketing is needed.
6. A national DNC list is neither appropriate nor necessary, nor is it constitutional.

References are to the appropriate paragraph (¶) of the NPR.

1. **Any New or Revised TCPA Rules Issued by the FCC Must Balance the Rights of Consumers With the Rights of Legitimate Telemarketers.**

When Congress enacted the TCPA in 1991, it specifically recognized that both individuals and legitimate telemarketers have rights that must be considered and protected. The statute itself states that its intent is to balance these rights. Indeed, the TCPA states clearly that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." (§ 2 (9) When the Commission chose the company–specific over the national DNC approach, it found that company-specific DNC rules "sufficiently balanced consumers' privacy interests with Congress's instruction that telemarketing practices not be unreasonably hindered." (¶ 5; see also ¶ 13-14)

The Commission itself says in the very first paragraph of its NPR that "…we seek to enhance consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers and regulators".

MBNA believes strongly that this balancing of rights must be the guiding principle in the Commission's evaluation of new or revised TCPA Rules for First Amendment reasons alone. In addition, it is important to consider the following:

(a) Legitimate telemarketers like MBNA are already required to comply, at great cost, with a maze of federal and state laws and regulations intended to protect various consumer interests. Many were enacted to deal with telemarketing practices that legitimate telemarketers have never engaged in, much less contemplated. We believe the Commission should clarify, modify (where appropriate), and vigorously enforce existing regulations, rather than adopt new regulations that impose significant new restrictions on legitimate telemarketers.

(b) The NPR makes clear that consumer privacy is the right that is to be measured and balanced with the rights of legitimate telemarketers. No claim has been made that protection of consumer privacy through new or revised TCPA Rules, primarily a national DNC list, would have positive economic consequences for consumers or anyone else. On the contrary, a national DNC list and other TCPA Rules that would further restrict telemarketing could inflict serious economic damage both on the telemarketing industry and on consumers. The severity of that potential damage needs *to* be studied and analyzed before the Commission takes any final action. By way of example, MBNA believes the Commission should consider the following:

- Women minorities and small businesses would be affected disproportionately by new restrictions that force telemarketers to scale back their operations. According to a recent study, almost 60% of those employed by outbound telemarketing firms are women; 62% of these women are also working mothers; and just over 25% are single working mothers. A similarly significant percentage of telemarketing employees belong to minority groups (primarily Black and Hispanic). Only a very small percentage of such employees are college graduates. Approximately 1,800 of the 2,500 members of the ATA are small businesses, as defined by the Small Business Administration.

- MBNA has experienced a significant decrease in telemarketing sales in states that have enacted DNC laws. This directly contradicts the assertion that such laws do not negatively affect sales because consumers on DNC lists would not make purchases from any telemarketer.

- Certain consumer products and services are sold successfully only via telemarketing. For example, in 2001 MBNAs outbound telemarketing group generated several billion dollars in balance transfers from individuals who had failed to respond to prior Direct Mail offers. This contradicts the frequent assertion that companies can compensate for lost telemarketing sales by turning to direct mail and other marketing channels.

  In 2002, MBNA will add more than several million new accounts via telesales to individuals who did not respond to identical Direct Mail solicitations. The response rate to telemarketed offers is many times higher than the Direct Mail response rate.

(c) The national DNC approach rejected by the Commission in 1992 represents the antithesis of the balancing of rights mandated by Congress. Its "all-or-nothing" approach limits consumers to only one real choice: permit all telemarketing calls or permit none. We believe this cannot fairly be called a balanced approach to telemarketing regulation.

For the above reasons, MBNA strongly urges the Commission to take a measured and deliberate approach to any new TCPA Rules that would dramatically reduce the ability *of* legitimate companies like MBNA to communicate with consumers. Alternatively, we believe that collaboration between the Commission and affected parties would result in balanced solutions to the issues the Commission has raised in its NPR.

2. The Company-Specific DNC Approach Chosen by the FCC in **1992** Remains Valid. Any **Issues** Related to This Approach Can and Should be Resolved Through Clarifying Regulations.

(a) The Commission requests comment on whether the company-specific DNC approach provides consumers with a reasonable means to curb unwanted telephone solicitations and adequately balances the rights of consumers and telemarketers. (¶14)

Comment: The Commission recognizes that any re-evaluation of the company-specific DNC approach must be guided by the principles of "reasonableness" and "balancing." This is fully consistent with its original conclusion, reached after evaluating and comparing the company-specific and national DNC approaches, that the former " sufficiently balanced consumers' privacy interests with Congress's instruction that telemarketing practices not be unreasonably hindered" (¶ 5; emphasis supplied).

Any re-evaluation of the reasonableness of the company-specific DNC approach should address, at the very least, the factors that influenced the Commission's 1991 decision:

i. The disadvantages of a national DNC database identified by the Commission remain pertinent. (¶ 5) In declining to create a national DNC database in 1991, the Commission identified several disadvantages to such an approach (cost; need for frequent updating; difficulty in maintaining accuracy; information security issues). Those disadvantages are no less pertinent today (see p. 9, infra).

ii. The advantages of the company-specific DNC approach identified by the Commission remain valid (¶ 16). The Commission enumerated a number of advantages that influenced its decision to choose the company-specific DNC approach. Those advantages remain valid and relevant today.

- Company-specific lists are already maintained by many telemarketers.
  Comment: MBNA, like all legitimate telemarketers, maintains a company-specific DNC list that complies with FCC regulations. To do so, the Company has invested heavily in information systems, and has implemented detailed policies and procedures, to insure compliance with those regulations. MBNA has found this approach very effective in providing consumers with a reasonable means to discontinue telephone solicitations from MBNA if they so choose.

- Company-specific lists allow residents and subscribers **to** selectively halt calls from telemarketers.
  Comment: This feature – selective consumer choice – is no less valid today than it was in 1992, when the Commission identified it as an important factor in selecting the company-specific approach. Indeed, this feature is the essence of reasonableness and balance because it leaves consumers free to choose, on an individual basis, the marketing solicitations they are willing to entertain and those they are not. Also, this approach helps customers and telemarketing companies maintain existing relationships that they might inadvertently impair were the customer to register on a national DNC list.

  In contrast, the intent and effect of the national DNC approach are to halt all commercial telemarketing calls and associated messages -- indeed, to close an entire channel of marketing communication. Can it fairly be argued that such an approach is reasonable and balanced?

- Company-specific lists allow businesses **to** gain useful information about consumer preferences.
  Comment: Unlike a national DNC approach, which acts as a form of prior restraint on commercial speech, the company-specific approach leaves open the opportunity for greater communication with consumers about a range of products and services of which they may have been unaware.

- Consumer confidentiality is protected since lists are not universally accessible.
  Comment: The privacy of personal information is of even greater concern today than it was a decade ago. MBNA does not disclose to any private party the consumer information contained on its DNC list, and has total control over the security and confidentiality of that information. Such security and confidentiality cannot be assured under a national (or any statewide) DNC approach, which involves the use of third–party list managers, and requires broad list accessibility and frequent updating. As a result, state DNC lists have given rise to information scams in some states.

- The costs of protecting consumers remain on telemarketers rather than telephone companies or consumers.
  Comment: Obviously, there would be significant costs to telephone companies if the Commission were to adopt a national DNC list (see TCPA § 227(c)(3)), and it is likely that those companies will address that issue in their comments. Less obvious, but even more significant, will be the additional costs imposed on consumers if the telemarketing industry is burdened with significant new restrictions. For example, each of the balance transfers referred to above (p. 3) enabled a consumer to lower his/her cost of credit. It is important that additional consumer costs be identified and quantified, and that they be factored into the balancing of rights process.

iii. Beyond the advantages *of* the company-specific approach enumerated by the Commission, there are other reasons why it is more reasonable and balanced than the national DNC approach.

- It is unlikely that the constitutionality of the company-specific approach will be challenged or that any such challenge, if undertaken, would be successful. In contrast, it is virtually certain that if the Commission were to dramatically change its policy and adopt a national DNC approach, that approach would be challenged on First Amendment and other grounds.

- Nearly 20% of all telephone numbers change each year (¶ 51) and are reassigned to different subscribers within 90 days on average. The numbers remain on DNC lists, even though the new subscribers have given no indication that they wish to restrict telemarketing calls to those numbers. This obvious inequity and distortion would affect telemarketers significantly more under the national DNC approach

(b) The Commission requests comment on whether the company-specific approach is "unreasonably burdensome" for consumers (¶ 14); on the effectiveness of consumer requests for inclusion on company DNC lists (¶ 14); and on possible steps to give consumers greater flexibility to register on such lists (¶ 17).

Comment: Certainly, the company-specific DNC approach cannot be said to have been unreasonably burdensome for the millions of consumers who have registered on company-maintained DNC lists over the past 10 years.

It is MBNAs practice to facilitate inclusion on its do-not-call list by honoring requests from customers or prospects made during telemarketing and customer service calls. This process is designed to give the consumer an easily exercisable "choice", and is neither burdensome nor complex. Once the request is made, the consumer's telephone number is promptly placed on MBNA's do-not-call list.

MBNA is not aware of any studies or data that point to widespread or systemic problems related to registration on company DNC lists. Notwithstanding, the Company would support reasonable modifications to FCC regulations relating to the company-specific approach that would be helpful to consumers. In fact, we believe that is precisely the correct approach to the issues raised by the Commission.

With respect to the specific potential modifications identified by the Commission (¶ 17), MBNA would support

- A mandatory toll-free number or website that consumers could access for registration purposes;
- Reasonable measures to assist disabled consumers;
- A specific time-frame (minimum: 30 days) to process DNC requests;

- A cooperative effort between the Commission, the telemarketing industry and other interested parties to better inform consumers of their right to register on companies' DNC lists
- "Safe harbor" practices, similar to those suggested by the FTC.

In the absence of evidence that consumer registration requests are being ignored, MBNA does not believe companies should be required to respond to, or confirm receipt of, such requests. Such a requirement has not been shown to be necessary, and would be costly and time-consuming for telemarketers.

MBNA also believes that, since almost 20% of all telephone numbers change each year (¶51), it is unreasonable to require telemarketers to honor DNC requests for 10 years. We believe 2-3 years would be a far more reasonable period, particularly if consumers are given a toll-free number for registration and re-registration purposes, and request the commission to shorten the period accordingly.

3. The Established Business Relationship ("EBR) Exemption Should Be Retained In Its Current Form.

The EBR exemption is statutory and was included in the TCPA for a host of valid policy and constitutional reasons. MBNA supports the current definition of the exemption and is not aware of any persuasive arguments to modify it. The exemption has allowed MBNA to reach millions of its customers, not only to maintain and service their accounts, but also to offer them opportunities to save money through rate discounts, lower fees, balance transfers and other special promotions. For example, 75% of all credit protection coverage is purchased by existing customers via telemarketed offers. Those customers received over $25 million in benefits from such coverage in 2001

In order to preserve the synergies that the financial modernization provisions of the Gramm-Leach-Bliley Act (GLBA) were designed to create, the EBR exemption must continue to permit employees of affiliates and subsidiaries to contact any customer of the broader family of companies. This provision preserves the consumer protection benefits GLBA was intended to provide, while recognizing common corporate structures.

4. The use **of** predictive dialers and answering machines detection technology should not be unreasonably restricted.

Predictive dialers are important to effective telemarketing and the Commission should not adopt rules that unreasonably restrict their use. However, MBNA is also sensitive to the issue of "dead air', which results primarily from running predictive dialers too quickly. While the misuse of predictive dialers can result in consumer frustration, a balancing of interests argues against rules that prevent their reasonable use. MBNA believes that "average abandonment rates" over the course of several hours are more reliable and accurate measures of reasonable use, since a number of factors can cause representative availability at any particular to vary widely (e.g. attendance; time of day; list quality; representative experience). Even in a completely manual environment, there would be times when a customer would pick up the telephone at the very moment the representative hangs up to dial another number.

Accordingly, we believe a more reasonable and equitable approach for the Commission would be to adopt a standard similar to that used by the DMA, which has set a 5% abandonment rate. MBNA adheres to this strict standard but strives to have abandonment rates as close to zero as possible. The 5% rate is flexible enough to allow businesses to use predictive dialer technology in a meaningful way, but does not permit abuse.

Answering Machine Detection (AMD) technology is often used in conjunction with automatic dialing systems either to send a prerecorded message to an answering machine or to transfer a call to a telemarketer when it detects that a customer has answered. This technology has greatly improved the efficiency of telemarketers, but its use can result in .2 to a maximum of 2 seconds of "dead air", as the call is connected to a telemarketing representative. It must be noted, however, that answering machines are only one reason for dead air. As previously noted, the overriding reason is telemarketer "running" of predictive dialers too fast, resulting in high abandonment rates. Requiring Caller ID with a toll-free callback number would likely force the running of predictive dialers at more reasonable speeds.

In conclusion, MBNA believes that issues inherent in the use of predictive dialers and AMD technology are complex and require more study. The Company is prepared to work with the FCC and other interested parties and to obtain data and identify solutions that balance consumer interests with the benefits derived from the proper use of this technology.

5. There Is A Need For A Uniform National Framework For the Regulation of Telemarketing.

(a) Federal law already provides a comprehensive regulatory framework for telemarketing, In 1992, when the Commission adopted rules implementing the TCPA, it addressed not only DNC lists, but other relevant issues as well (calling hours; autodialing; prerecorded messages)(¶ 4). No persuasive argument has been advanced that there is a need for state legislation in those areas. On the contrary, a patchwork of redundant and conflicting state laws and regulations, including but not limited to state DNC laws, serves only to impose unnecessary additional burdens on the telemarketing industry and additional costs on consumers. Such laws frustrate the Congressional mandate that the rights and interests of legitimate telemarketers be balanced with those of telephone subscribers.

(b) States do not have the power to regulate interstate telemarketing. While states can regulate **intrastate** commercial telemarketing calls, the Communications Act of 1934 precludes them from imposing restrictions on **interstate** calling. Specifically, the TCPA clearly enunciates Congress' intent that the Commission is to have exclusive authority to regulate use of the interstate telephone network for unsolicited telemarketing. Accordingly, a state DNC law applies only to telemarketers located in that state, and only to calls those telemarketers make to residents of that state. State law is not applicable to, or enforceable against, either out-of-state telemarketers or in-state telemarketers calling out-of-state. In those instances, the TCPA applies exclusively, as do the enforcement remedies the Act provides. The Commission should make a clear and unequivocal statement concerning the limited applicability, if any, of state DNC and other telemarketing laws, as state Attorneys General continue to enforce state laws against companies conducting interstate telemarketing activities.

(c) Since the Commission has concurrent jurisdiction over intrastate telemarketing activities, there is no need for state regulation in that area. The Commission recognizes its concurrent jurisdiction over intrastate communications under sec. 227 of the TCPA (seen 66, fn. 219). Under such circumstances, and given the burden that state anti-telemarketing legislation represents, MBNA submits that federal law can and should occupy the entire field of telemarketing regulation.

6. A National DNC List **Is** Not Appropriate or Necessary, Nor **Is** It Constitutional

The Commission should not consider reversing its 1992 decision to reject the national DNC approach in the absence of new, compelling evidence supporting that approach. Such evidence has not been uresented.

(a) A national DNC list is not appropriate. All the disadvantages to a national DNC approach that the commission identified in 1992 remain pertinent today.

- A national DNC database will be costly
  Comment: The Commission heard projections in 1991 that first-year start-up and operational costs for a national database could range from $20 to $80 million (¶ 51, fn.181). MBNA has seen no credible estimates that such costs would be significantly lower today. Since this is too important a matter to be left to speculation, MBNA suggests an in-depth study of setup and maintenance costs associated with the national DNC list to determine whether, in fact, they would be significantly lower today than they were forecasted to be in 1992.

- A national DNC database will be difficult to maintain in an accurate form.
  Comment: In rejecting the national database approach in 1992, the Commission concluded that such a database would be difficult to establish and maintain in a reasonably accurate form, and would require frequent updates because nearly 20% of all telephone numbers change each year. (¶ 51) Given this fact, and the requirement (which MBNA views as unreasonable) that telephone numbers remain on its DNC list for 10 years, it is hardly surprising that a significant percentage of those numbers are no longer assigned to the household that originally registered on that list. Clearly, millions of consumers are precluded from receiving telemarketing calls because, unknown to them, their numbers are on one or more DNC lists. This raises both fairness and Constitutional issues that would only be exacerbated should a national DNC list be adopted.

- A national DNC database could compromise the security of telemarketer and subscriber information.
  Comment: The Commission expressed concerns about potential threats to information privacy emanating from adoption of the national DNC approach. It is not possible at this time for MBNA to evaluate the seriousness of such threats, but we believe the Commission should not proceed without a through evaluation in this area.

(b) **A** National **DNC** list **is** not necessary.

Proponents of the national DNC approach should have the burden of demonstrating that it is necessary in order to achieve the intent and goals Congress communicated at the time it enacted the TCPA.

However, as previously discussed, a central tenet of TCPA is an appropriate balancing of the rights of residential telephone subscribers and commercial telemarketers. Far from helping to achieve such a balance, a national DNC approach absolutely prevents it.

The FCC notes that over a two-year period it received 26,900 TCPA-related inquiries and 11,000 complaints about telemarketing practices. Inquiries prove nothing about the effectiveness of the company–specific DNC approach, nor do they provide any basis for Commission action. With respect to the complaints, which represent an infinitesimal percentage of the daily number of telemarketing calls, MBNA requests the opportunity to review them to determine the nature of the specific practices complained of, and the extent to which such practices reasonably require new TCPA Rules, as opposed to more vigorous enforcement of existing rules.

(c) The national **DNC** approach **is** unconstitutional.

MBNA believes strongly that the national DNC approach represents an impermissible restriction on commercial speech and thus violates the First Amendment to the Constitution. MBNA endorses the position and arguments on this issue set forth in comments submitted by the American Teleservices Association.

Conclusion

For the foregoing reasons, MBNA respectfully submits that the Commission should retain the bulk of its TCPA Rules. In particular, the Commission should retain the company–specific DNC requirement, should reject proposals for a national DNC list, and should exercise its exclusive authority to regulate telemarketing.

Respectfully submitted,
MBNA American Bank, N.A.

By: /s/ Joseph R. Crouse

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